Supreme Court, U.S.
FILED

97 807 NOV 10 1997

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

October Term, 1997

KENNETH HUTCHINSON,

Petitioner,

-vs-

FISERV C.I.R., INC.,
and
BRIAN MURPHY-MOLLOY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

AND APPENDICES

ALLEN J. COUNARD (P12268)
CHARLES A. BUTLER (P40383)
ALLEN J. COUNARD, P.C.
2320 West Jefferson
Trenton, Michigan 48183-2706
(313) 692-0033

Counsel for Petitioner

JAMES GEORGE GROSS (P28268)
Counsel of Record
STEVEN G. SILVERMAN (P26942)
GROSS, NEMETH & SILVERMAN, P.L.C.
535 Griswold, Suite 1850
Detroit, Michigan 48226
(313) 963-8200

Co-Counsel for Petitioner

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

41 pp

QUESTION PRESENTED

DID THE SIXTH CIRCUIT'S FAILURE TO ANALYZE THIS AGE DISCRIMINATION CASE PURSUANT TO APPROPRIATE EVIDENTIARY STANDARDS AND APPROPRIATE STANDARDS OF REVIEW OF A DENIAL OF A MOTION FOR JUDGMENT AS A MATTER OF LAW CONSTITUTE A "DEPART[URE] FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS * * * [SO] AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER"?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION:

THE SIXTH CIRCUIT'S FAILURE TO ANALYZE THIS AGE DISCRIMINATION CASE PURSUANT TO THE EVIDENTIARY STANDARDS ENUNCIATED BY THIS COURT IN *McDONNELL DOUGLAS CORP.* v. *GREEN* AND CLARIFIED BY THIS COURT IN *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS* v. *BURDINE*, AND *ST MARY'S HONOR CENTER* v. *HICKS*, PARTICULARLY AS INTERPRETED BY THE SIXTH CIRCUIT ITSELF IN *KLINE* v. *T.V.A.*, CONSTITUTES A "DEPART[URE] FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS * * * [SO] AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER" AND RESULTS IN A DECISION AT ODDS WITH OTHER CIRCUIT COURTS OF APPEALS REGARDING THE QUESTION OF THE APPROPRIATE EVIDENTIARY STANDARDS TO BE EMPLOYED IN SUCH CASES. 5

CONCLUSION 17

APPENDICES:

Appendix A – 8/12/97 ORDER DENYING PLAINTIFF'S PETITION FOR REHEARING, United States Court of Appeals for the Sixth Circuit A-1

Appendix B – 7/8/97 OPINION (unpublished), United States Court of Appeals for the Sixth Circuit A-2

PAGE

Appendix C – 6/26/95 ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR NEW TRIAL, United States District Court, Eastern District of Michigan, Southern Division A-10

Appendix D – 6/26/95 ORDER DENYING DEFENDANTS' MOTION FOR REMITTITUR AND/OR AMEND JUDGMENT, United States District Court, Eastern District of Michigan, Southern Division A-11

Appendix E – 4/26/95 ORDER OF JUDGMENT, United States District Court, Eastern District of Michigan, Southern Division .. A-12

Appendix F – 8/21/91 PLAINTIFF'S FIRST AMENDED COMPLAINT, United States District Court, Eastern District of Michigan, Southern Division A-13

TABLE OF AUTHORITIES

PAGE(S)

CASES:

Barbour v. *Merrill*, 49 F.3d 1270 (D.C. Cir. 1995) 12

Barnell v. *Taubman Co., Inc.*, 203 Mich.App. 110; 512 N.W.2d 13 (1993) 14

Binder v. *Long Island Lighting Co.*, 57 F.3d 193 (2nd Cir. 1995) 12

Brownlow v. *Edgecomb Metals Co.*, 867 F.2d 960 (6th Cir. 1989) 8

E.E.O.C. v. *Ethan Allen, Inc.*, 44 F.3d 116 (2nd Cir. 1994) 10, 13

Erie Railroad. Co. v. *Tompkins*, 304 U.S. 64 (1938) 2

Gaworski v. *ITT Commercial Finance Corp.*, 17 F.3d 1104 (8th Cir. 1994) 10, 14

Kline v. *Tennessee Valley Authority*, ___ F.3d ___, No. 94-6355, 1997 WL 631184 (6th Cir. October 15, 1997) 4-9, 11, 18

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) 4, 5, 6

Nelson v. *Boatmen's Bancshares, Inc.*, 26 F.3d 796 (8th Cir. 1994) 10

Pleith v. *St. Raymond Church*, 210 Mich.App. 568; 534 N.W.2d 164 (1995) 2

Seman v. *Coplay Cement Co.*, 26 F.3d 428 (3rd Cir. 1994) 13

Shaw v. *H.C.A. Health Services of Midwest, Inc.*, 79 F.3d 99 (8th Cir. 1996) 13, 14

Sheridan v. *E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3rd Cir. 1996) 12, 16, 17

St. Mary's Honor Center v. *Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)..... 4-9

PAGE

Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) 4, 5

Tinker v. *Sears, Roebuck & Co.*, ___ F.3d ___, No. 96-1418, 1997 WL 628995 (6th Cir. October 14, 1997) 2

Washington v. *Garrett*, 10 F.3d 1421 (9th Cir. 1993) 13

STATUTES & RULES:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332 2

28 U.S.C. § 1441 2

Fed.Rules Civ.Proc.Rule 50 3

Mich. Comp. Laws § 37.2101 *et seq.*; Mich. Stat. Ann. § 3.548(101) *et seq.* 1, 2

Mich. Comp. Laws § 37.2202(1)(a); Mich. Stat. Ann. § 3.548(202)(1)(a) 1, 2

Sup. Ct. R. 10 17

Sup. Ct. R. 10(a) 4

Sup. Ct. R. 16.1 18

KENNETH HUTCHINSON respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. Pursuant thereto, this Court should enter a summary disposition on the merits in which it VACATES the opinion of the Sixth Circuit in this case and REMANDS this case to the Sixth Circuit for consideration of Respondents' appeal of an Order of Judgment entered by the United States District Court, Eastern District of Michigan, confirming a jury verdict of $800,000 in favor of MR. HUTCHINSON on his age discrimination claim against Respondents, FISERV-C.I.R., INC. and BRIAN MURPHY-MOLLOY (and for plenary consideration of MR. HUTCHINSON's cross-appeal to that Court). (Appendix E).

OPINIONS BELOW

The opinion of the Sixth Circuit (Appendix B) is unreported. The Eastern District of Michigan issued no opinions.

JURISDICTION

The Sixth Circuit issued its opinion and entered its judgment on July 8, 1997. (Appendix B). The Sixth Circuit denied Petitioner's timely petition for rehearing on August 12, 1997. (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Petitioner's age discrimination suit is based on Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101 *et seq.*; Mich. Stat. Ann. § 3.548(101) *et seq.* Section 202 of that act provides, in relevant part:

> "(1) An employer shall not do any of the following:

> "(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status."

Mich. Comp. Laws § 37.2202(1)(a); Mich. Stat. Ann. § 3.548(202)(1)(a).

In diversity cases, federal courts apply state substantive law. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938). Michigan courts consider federal law when reviewing claims of age discrimination based on Michigan law. *Tinker* v. *Sears, Roebuck & Co.*, ___ F.3d ___, No. 96-1418, 1997 WL 628995 (6th Cir. October 14, 1997) at *2; *Pleith* v. *St. Raymond Church*, 210 Mich.App. 568, 573; 534 N.W.2d 164, 167 (1995).

STATEMENT OF THE CASE

Petitioner initially filed this case in the Circuit Court for the County of Oakland, State of Michigan, on April 18, 1991. Petitioner alleged that Respondents had violated the age discrimination provisions of Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101 *et seq.*; Mich. Stat. Ann. § 3.548(101) *et seq.*, regarding Petitioner's employment and discharge. (See Appendix F).

This case was removed to the United States District Court, Eastern District of Michigan, Southern Division, pursuant to 28 U.S.C. §§ 1332 and 1441, based on diversity of citizenship and amount in controversy. Petitioner is a citizen of Michigan. Respondent, FISERV-C.I.R., INC., is a Delaware corporation, its principal place of business is in Connecticut, and it does business in Michigan. Respondent, BRIAN MURPHY-MOLLOY, is a citizen of Vir-

ginia. The amount in controversy exceeded the then-existing $50,000 jurisdictional limit.

On April 19, 1995, after a trial that began on April 11, 1995, a federal district court jury concluded that Respondents had discriminated against MR. HUTCHINSON on the basis of age. The next day, an Order of Judgment was entered confirming the award of $800,000 in damages to Petitioner. (Appendix E).

Respondents' motions for judgment as a matter of law, new trial, remittitur and/or to amend the judgment and to stay execution of judgment were denied in orders entered on June 26, 1995. (Appendices C and D). Respondents appealed to the United States Court of Appeals for the Sixth Circuit.

On July 8, 1997, the Sixth Circuit issued an opinion reversing the district court's denial of respondents' motion for judgment as a matter of law and remanding this case to the district court with instructions to enter judgment in favor of respondents. (Appendix B at 1-2). On July 21, 1997, MR. HUTCHINSON filed a Petition for Rehearing in the Sixth Circuit. He alleged that the Sixth Circuit misconstrued the applicable substantive evidentiary standards governing age discrimination complaints and violated procedural requisites in its review of the record in an appeal from a denial of a motion for judgment as a matter of law. Fed.Rules Civ.Proc.Rule 50. On August 12, 1997, the Sixth Circuit issued an order denying Petitioner's Motion for Rehearing. (Appendix A).

REASONS FOR GRANTING THE PETITION

The denial of MR. HUTCHINSON's Petition for Rehearing in the Sixth Circuit predates the issuance by that same Court of its opinion in *Kline* v. *Tennessee Valley Authority*, ___ F.3d ___, No. 94-6355, 1997 WL 631184 (6th Cir. October 15, 1997). *Kline* establishes that the Sixth Circuit's opinion in this case ignores or misconstrues the applicable substantive evidentiary standards governing age discrimination complaints as enunciated by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), clarified by this Court in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), and again clarified by this Court in *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) and should be viewed as aberrational according to **Sixth Circuit case law** applying the *McDonnell Douglas-Burdine-St. Mary's Honor Center* standards. *Kline* also establishes that the Sixth Circuit failed to abide by critical procedural requisites in its review of the record in an appeal from a denial of a motion for judgment as a matter of law authorized not just by other Circuit Courts of Appeals but by the Sixth Circuit itself.

For these reasons, this Court should GRANT this Petition for Writ of Certiorari, pursuant to Sup. Ct. R. 10(a), because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" **and** "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's supervisory power". Pursuant thereto, this Court should enter a summary disposition on the merits in which it VACATES the opinion of the Sixth Circuit in this case and REMANDS this case to the Sixth Circuit for consideration of Respondents' appeal in light of *Kline* and for plenary consideration of MR. HUTCHINSON's cross-appeal to that Court. Sup. Ct. R. 16.1.

THE SIXTH CIRCUIT'S FAILURE TO ANALYZE THIS AGE DISCRIMINATION CASE PURSUANT TO THE EVIDENTIARY STANDARDS ENUNCIATED BY THIS COURT IN *McDONNELL DOUGLAS CORP.* v. *GREEN* AND CLARIFIED BY THIS COURT IN *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS* v. *BURDINE*, AND *ST MARY'S HONOR CENTER* v. *HICKS*, PARTICULARLY AS INTERPRETED BY THE SIXTH CIRCUIT ITSELF IN *KLINE* v. *T.V.A.*, CONSTITUTES A "DEPART[URE] FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS * * * [SO] AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER" AND RESULTS IN A DECISION AT ODDS WITH OTHER CIRCUIT COURTS OF APPEALS REGARDING THE QUESTION OF THE APPROPRIATE EVIDENTIARY STANDARDS TO BE EMPLOYED IN SUCH CASES.

The familiar tripartite shifting-burdens framework for disposition of employment discrimination cases most recently has been addressed by this Court in *St. Mary's Honor Center* v. *Hicks*, *supra*.[1] As the Sixth Circuit observed in *Kline* v. *T.V.A.*, *supra*, this Court intended to address a conflict that had arisen among the circuits regarding whether a plaintiff's burden to prove that an employer's articulation of a nondiscriminatory reason for the adverse employment action at issue was actually

---

1 **The Sixth Circuit summarized this approach in *Kline*, *supra*:**

> **"First, the plaintiff must prove a prima facie case of discrimination. *Burdine*, 450 U.S. at 252-53 (citing *McDonnell Douglas*, 411 U.S. at 802 (1973)). If the plaintiff establishes its prima facie case, the burden then shifts to the defendant to 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.' *Id.* (quoting *McDonnell Douglas*, 411 U.S. at 804). If the defendant carries this burden, the plaintiff must prove that the proffered reasons were pretextual. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 804). Pretext is established by a direct showing that a discriminatory reason more likely motivated the employer or by an indirect showing that the employer's explanation is not credible. *Id.* at 256."**

***Id.* at *5.**

pretextual included both evidence of pretext and **additional** evidence of discrimination ("pretext plus") or whether evidence of pretext alone was sufficient to **require** judgment to be entered in favor of the plaintiff ("pretext only"). 1997 WL 631184 at *6.

This Court rejected both approaches. Rejecting the "pretext only" approach, this Court held that evidence from which a jury could disbelieve the employer's allegedly non-discriminatory reasons did not **compel** that judgment be entered in favor of the plaintiff. 509 U.S. at 511. This Court also rejected the "pretext plus" approach in the following oft-cited passage:

> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is *required*,' 970 F.2d at 493 (emphasis added)."

Id.

The Sixth Circuit in this case blatantly misconstrues the foregoing. Despite paying lip service to the *McDonnell Douglas-Burdine-St. Mary's Honor Center* tripartite shifting-burdens approach, it conceived its role as reviewing court as searching the record for a preponderance of evidence establishing that age was the determining factor in the elimination of MR. HUTCHINSON's position. (Appendix B at 6; A-7). It concluded that, "Hutchinson has failed to produce any evidence" to sustain his burden of persuasion in that regard. (Appendix B at 6-7; A-7).

In light of the Sixth Circuit's recent decision in *Kline*, the panel that decided this case misconstrued its role

according to *St. Mary's Honor Center*. In *Kline*, the Sixth Circuit reversed a bench judgment against the plaintiff's claim of age discrimination. The Sixth Circuit concluded that, contrary to *St. Mary's Honor Center*, the United States District Court for the Eastern District of Tennessee, sitting as the factfinder, misinterpreted the ultimate burden of persuasion borne by plaintiffs in employment discrimination cases. *Kline*, *supra*, 1997 WL 631184 at *12. The Sixth Circuit observed:

> "In effect, the district court placed a nearly impossible burden on Kline requiring direct evidence of discrimination. Rarely can discriminatory intent be ascertained through direct evidence because rarely is such evidence available. This is the reason for the *McDonnell Douglas-Burdine* burden of proof mechanism, allowing a plaintiff to prove its case through circumstantial evidence."

Id.

Of paramount significance to this case, the District Court in *Kline* reached the same conclusion as did the Sixth Circuit here:

> "Intimating that the evidence used to establish the prima facie case was irrelevant, the [District C]ourt stated that '[t]here simply was no proof that discrimination was the reason Beckler was selected.'"

Id. at 13. The Sixth Circuit rejected that claim:

> "**This statement ignores the fact that some evidence of discrimination had to be ascertained in order for Kline to prove his prima facie case**. In fact, the issue of whether Kline established a prima facie case has never been in doubt. That Kline established his prima facie case has been implicitly and explicitly acknowledged both before this court in the first appeal

> and by the district court both in the initial proceeding and upon remand from this Court."

Id. (emphasis added).

In this case, the Sixth Circuit evaded the question of whether MR. HUTCHINSON established a prima facie case of age discrimination. Instead, it relied on a case preceding *St. Mary's Honor Center* that permitted a reviewing court to "'proceed directly to the ultimate question whether plaintiff has established discrimination'" "'when a case has been tried on the merits'". (Appendix B at 5; A-6, quoting *Brownlow* v. *Edgecomb Metals Co.*, 867 F.2d 960, 963 (6th Cir. 1989)). Since the jury returned a verdict in favor of MR. HUTCHINSON, it should be presumed that a prima facie case was presented.[2]

Thus, as in *Kline*, "some evidence of discrimination had to be ascertained" by MR. HUTCHINSON in this case. The Sixth Circuit's search for such evidence can only be interpreted as a search for direct evidence of age discrimination apart from the evidence presented in MR. HUTCHINSON's prima facie case. Regardless of the terminology used by the Sixth Circuit in this case, the effect of the Sixth Circuit's ruling is to resurrect the "pretext plus" doctrine rejected by this Court in *St. Mary's Honor Center*, *supra* as acknowledged by the Sixth Circuit in *Kline*, *supra*.

---

[2] The record in this case — largely acknowledged by the Sixth Circuit's opinion in this case — demonstrates that sufficient evidence of a prima facie case was presented: (1) Plaintiff was 59 years old when he ceased working for Citicorp Information Resources, Inc. ("Citicorp"), predecessor to Respondent FISERV-C.I.R., INC. (Appendix B at 3; A-4); (2) Plaintiff's job was eliminated by Citicorp (Appendix B at 3; A-4); (3) Plaintiff was qualified to perform his job as a senior account executive (Plaintiff's Brief on Appeal in the Sixth Circuit at 12-16 and citations to record therein); (4) Someone younger, JOHN URBAN, was selected over Plaintiff to remain as the sole senior account executive (Appendix B at 3; A-4).

In so doing, the panel of the Sixth Circuit in this case not only scorns the work of their brethren on the Sixth Circuit bench but also defies the dictates of this Court. Rather than embark upon that crusade, the panel in this case should have limited itself to a determination of whether MR. HUTCHINSON presented enough evidence to create a genuine issue of material fact as to the credibility of Respondents' proffered nondiscriminatory reasons for the elimination of his job:

> "The evidence that established Kline's prima facie case, along with a rejection of the reasons offered by the defendant, would have been sufficient to allow the district court to infer discrimination on the part of TVA. **Implicit in Kline's prima facie case was a determination of whether he was qualified for the personnel officer position**. The district court erroneously determined that inferences drawn from Kline's prima facie case are unavailing and of no effect. **The *inferences* drawn from Kline's prima facie case along with a rejection of the reasons offered by the defendant to explain the adverse employment action, permit a factfinder to find the existence of discrimination.**"
>
> * * *
>
> "The Supreme Court [in *St. Mary's Honor Center*] determined that upon rejection of the reasons offered by the defendant an inference of discrimination is permitted and no additional proof of discrimination is required."

Kline, *supra*, 1997 WL 631184 at *7, *13 (italics in the original) (other emphasis added).

The utter failure of the panel in this case to follow the dictates of this Court in *St. Mary's Honor Center* and of the Sixth Circuit itself in the unfortunately-timed subsequent issuance of *Kline* constitutes just the sort of "depart[ure] from the accepted and usual course of

judicial proceedings * * * [so] as to call for an exercise of this Court's supervisory power".

Of equal significance, to the extent that the panel in this case reviewed the record to determine whether a genuine issue of material fact existed as to whether Respondents' proffered nondiscriminatory reasons were pretextual, its efforts were fatally tainted by the panel's failure to abide by well-established procedural rules for review of a denial of a motion for judgment as a matter of law. The United States Court of Appeals for the Eighth Circuit has stated those rules with succinctness:

> "On appeal our task is limited. We must (1) consider the evidence in the light most favorable to [the plaintiff]; (2) assume that all conflicts in the evidence were resolved by the jury in [the plaintiff's] favor; (3) assume [the plaintiff] proved all the facts his evidence tends to prove; (4) give [the plaintiff] the benefit of all favorable inferences that may reasonably be drawn from the facts proved; and (5) affirm the denial of the motion for judgment as a matter of law if reasonable persons could differ as to the conclusions to be drawn from the evidence."

Gaworski v. *ITT Commercial Finance Corp.*, 17 F.3d 1104, 1108 (8th Cir. 1994).[3]

In this case, the Sixth Circuit simply applied the converse of those rules. In assessing whether a genuine issue of material fact exists on the question of pretext, where the evidence raises a question of the believability and not the propriety of the proffered nondiscriminatory reasons for the adverse employment action, the issue is properly left for jury consideration. *Gaworski*, *supra*, at 1110.

---

[3] **Accord: *E.E.O.C.* v. *Ethan Allen, Inc.*, 44 F.3d 116, 119 (2nd Cir. 1994); *Nelson* v. *Boatmen's Bancshares, Inc.*, 26 F.3d 796, 800 (8th Cir. 1994).**

Such evidence was presented in *Kline*, *supra*. There, the defendant contended that the non-selection of the plaintiff in 1991 was based on a draft job description of the position at issue. However, there was testimony to the effect that the job description was destroyed two years earlier in 1989. The Sixth Circuit found it "curious how the parties who were conducting the reselection process in 1991 could have relied on a draft job description that was allegedly destroyed in July 1989". 1997 WL 631184 at *14. Such evidence was sufficient to permit a reasonable jury to infer that the proffered reasons of the defendant were pretextual. Indeed, they rose to the level of "a suspicion of mendacity" to which this Court referred in *St. Mary's Honor Center*.

The same type of evidence was presented in this case. Respondents' credibility was directly challenged by its behavior with respect to its policy manual. Respondents claimed that seniority was not a factor in determining who would be "job discontinued." (TR Vol IV at 46-47). However, testimony from FISERV personnel contradicted that assertion. FISERV personnel testified that seniority was the heaviest weighted factor when determining who would be "job discontinued". (TR Vol IV at 24-27). FISERV personnel also acknowledged that the existence of testimony in prior litigation to the effect that the termination of one of the account executives in another employment action was due entirely to the fact that he was the **least** senior Account Executive. (TR Vol IV at 49-50). Indeed, as was the relative case between MR. HUTCHINSON and the person who replaced him, the terminated account executive had the least seniority but not the lowest performance ranking.

Documentary evidence to support MR. HUTCHINSON's claim was provided by the aforementioned policy manual — a document offered into evidence by Respondents that establishes seniority as the first consideration when determining job discontinuance. (TR Vol IIb at 47; TE #71 at § 2/9, p 2). Of equal significance, despite the

fact that Respondents introduced the policy manual into evidence, it was Respondents that eventually attempted to impeach its relevance by attempting to prove that the policy manual was not applicable to the facility where MR. HUTCHINSON was employed. (TR Vol IV at 133-135). **In and of itself**, that maneuver would be sufficient to raise a genuine issue of material fact as to the believability of Respondents' proffered explanations for its actions.[4] Indeed, as the United States Court of Appeals for the Second Circuit observes:

> "Resort to a pretextual explanation is, like flight from the scene of the crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct."

Binder v. *Long Island Lighting Co.*, 57 F.3d 193, 200 (2nd Cir. 1995).[5]

In this case, however, additional evidence was adduced from which a jury could reasonably conclude that Respondents' proffered explanation of "economic necessity" was pretextual:

1. Respondent MURPHY-MOLLOY systematically removed MR. HUTCHINSON's supervisory responsibil-

---

4 As a substantive matter, Respondents' maneuver also lacked credibility since it was Respondents that had established that the policy manual was, indeed, applicable to C.I.R. Troy. (TR Vol IIb at 46-47). See also *Barbour* v. *Merrill*, 49 F.3d 1270 (D.C. Cir. 1995).

5 Referring to that quotation, the Third Circuit surmised:

> "We presume that the same logic, albeit unarticulated, was the basis for the Supreme Court's statement in *Hicks* that disbelief of the employer's reason will permit the factfinder to infer the ultimate fact of discrimination, 509 U.S. at 511, 113 S.Ct. at 2749, even though the presumption of discrimination 'drops from the case' after the employer proffers a legitimate reason for its actions. *Burdine*, 450 U.S. at 255 n.10, 101 S.Ct. at 1095 n.10."

Sheridan v. *E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1069 (3rd Cir. 1996).

ities and gave them to younger people. (TR Vol Ib at 64-72; TE #33). These are not instances where a single replacement by a younger employee "stands alone"; rather, they occurred in a systematic pattern. See *E.E.O.C.* v. *Ethan Allen, Inc.*, 44 F.3d 116 (2nd Cir. 1994).

2. While still in a supervisory position, MR. HUTCHINSON hired and trained Ms. Molly Maginity who at the time was in her twenties. (TR Vol IIa at 8-9). MR. HUTCHINSON was shortly thereafter demoted by Respondent MURPHY-MOLLOY to the position of Senior Account Executive and was replaced by Ms. Maginity to whom he was now required to report. (*Id.*; TR Vol Ib at 55-56, 76-77; TE #52). Petitioner was told by Respondent MURPHY-MOLLOY that he preferred Ms. Maginity reporting to him. (TR Vol IIa at 45-49). See *Washington* v. *Garrett*, 10 F.3d 1421 (9th Cir. 1993).

3. In **addition** to being younger than MR. HUTCHINSON, JOHN URBAN — who was retained when MR. HUTCHINSON's job was terminated — was not as qualified for the position as MR. HUTCHINSON. MR. HUTCHINSON was the one who handled the key accounts. (TR Vol Ia at 80; TR Vol IIa at 11, 63, 76, 83-85; TR Vol IV at 97, 102-103, 118). MR. HUTCHINSON was also the one the other account executives went to when they had problems. (TR Vol IIa at 64-65; TR Vol IV at 93-94). MR. HUTCHINSON was even responsible for getting some of MR. URBAN's largest accounts to sign long term contracts. (TR Vol IIa at 37-38, 83-85; TE #39). See *Seman* v. *Coplay Cement Co.*, 26 F.3d 428 (3rd Cir. 1994).

4. The first documented act of Respondent MURPHY-MOLLOY as Petitioner's supervisor was to send a monthly letter to headquarters which put MR. HUTCHINSON in a false bad light. (TR Vol Ib at 30-34; TE #26). See *Shaw* v. *H.C.A. Health Services of Midwest, Inc.*, 79 F.3d 99 (8th Cir. 1996).

5. Respondent MURPHY-MOLLOY falsely accused MR. HUTCHINSON of taking kickbacks with regard to purchases made for the facility. (TR Vol Ib at 57-59). See *Shaw*, *supra*.

6. Respondent MURPHY-MOLLOY's first evaluation of MR. HUTCHINSON's performance was the worst Petitioner had ever received and on some of the appraisal points false comments were made and the overall ranking was simply wrong. (TR Vol IIa at 13-34; TE #38). See *Shaw*, *supra*; *Gaworski*, *supra*.

None of this evidence is recounted in the Sixth Circuit's opinion in this case because the panel improperly reviewed the evidence in the light most favorable to Respondents. The panel first employed the proverbial straw-man technique:

> "Hutchinson argues that his various transfers and subsequent replacement by younger employees indicate that the defendants discriminated against him on the basis of his age. However, an individual's replacement by a younger employee, **standing alone**, is insufficient to raise an inference of age discrimination under Michigan law. *See Barnell* [v. *Taubman Co., Inc.*, 203 Mich.App. 110, 512 N.W.2d 13, 19 (1993)]."

(Appendix B at 7; A-7–A-8) (emphasis added).

However, the fact that a younger employee was retained in place of Petitioner does **not** stand alone. The record includes evidence that the retention of MR. URBAN violated company policy regarding reductions-in-force, a policy enforced in other such employment actions. That evidence was sufficient to create a jury-submissible issue.

Virtually acting as an advocate for Respondents, the panel then set out to refute that contention:

> "Even if Hutchinson is correct that employees with seniority should be accorded certain preferences under Citicorp's policy manual, **the manual does not state that the company is required to retain less competent employees merely because of their seniority**."

(Appendix B at 7; A-8) (emphasis added). The significance of that fact to the panel was that "[t]he **defendants** note that Urban was rated higher than any other senior executive on the 1989 performance appraisal; he was the only senior account executive to receive a rating of 'outstanding'." (Appendix B at 7; A-8) (emphasis added).

Notably absent from that Court's opinion is any effort to search the record to determine whether evidence was presented from which a jury could reasonably conclude that MR. HUTCHINSON was not less competent — in any meaningful sense — than MR. URBAN. Such evidence exists — in exhaustive detail. (Plaintiff's Brief on Appeal at 12-16).[6]

Ignoring that evidence, the panel in this case proceeded to discuss the hiring of MR. BARAGE by Respondent FISERV contemporaneously with its formal severance of ties with Petitioner. (Appendix B at 8; A-9).The panel found that such evidence did not create "an inference of age discrimination in this case". (Appendix B at 8; A-9). The panel could reach that conclusion only by focusing on evidence presented by Respondents in the light most favorable to Respondents:

> "However, **Citicorp** notes that its financial situation greatly improved between June, 1989, when it discharged four of the five senior account

---

6 In view of the presentation contained in Plaintiff's Brief, the suggestion of the panel in this case that "Hutchinson does not challenge the impartiality of that judgment" (Appendix B at 7-8; A-8) is quixotic at best.

> executives, and February 1990, when it decided to hire Barage."

(Appendix B at 8; A-9) (emphasis added).

However, given the fact that the record demonstrates that the proffered explanation for that decision — the improved economic outlook for Citicorp — was due to the work MR. HUTCHINSON had performed before being severed (TR Vol IV at 124-125), a jury could reasonably conclude that the failure to rehire the architect of the improved economic position of Respondent and the hiring of a younger person instead were motivated by considerations of age discrimination.

In light of the foregoing, the Sixth Circuit's unabashed conclusion "that a reasonable person **could not have concluded** that age was a determining factor in Citicorp's decision to eliminate Hutchinson's position" is sheer sophistry, made possible only by a refusal to evaluate the record according to universally-followed standards of review. (Appendix B at 8; A-9) (emphasis added). Once again, the performance of the panel in this case, in blatantly disregarding those standards, calls into question the entire foundational basis for its ultimate holding. As in the case of the panel's disregard of the appropriate evidentiary standards, the panel's action represents such a "depart[ure] from the accepted and usual course of judicial proceedings * * * [so] as to call for an exercise of this Court's supervisory power". In this case, more than sufficient evidence was adduced to raise a genuine issue of material fact as to the believability of Respondents' proffered reasons for their challenged actions. As the United States Court of Appeals for the Third Circuit observed:

> "The district court must determine whether the plaintiff has cast sufficient doubt upon the employer's proffered reasons to permit a reasonable factfinder to conclude that the reasons are incredible[.]"

* * *

> "But once the court is satisfied that the evidence meets this threshold requirement, **it may not pretermit the jury's ability to draw inferences from the testimony, including the inference of intentional discrimination drawn from an unbelievable reason proffered by the employer.**"

Sheridan v. *E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1072 (3rd Cir. 1996) (emphasis added).[7]

CONCLUSION

By its holding in *Kline* v. *T.V.A.*, *supra*, the Sixth Circuit has affirmed its adherence to the evidentiary standards enunciated by this Court in *St. Mary's Honor Center* and the standards of review adhered to by the various Circuit Courts of Appeals. *Kline*, however, postdated the order denying MR. HUTCHINSON's Petition for Rehearing in that Court.

Petitioner is acutely aware that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law". Sup. Ct. R. 10. However, at the time it issued its order denying MR. HUTCHINSON's Petition for Rehearing, the Sixth Circuit panel had not properly delineated the evidentiary standards appropriate to this case. At that time, the Sixth Circuit panel stood apart from the decisions of this Court and the various Circuit Courts of Appeals that had

---

7 **The Eighth Circuit has reached the same conclusion:**

> **"Thus, if (1) the elements of a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred, and we are without power to reverse the jury's finding."**

***Gaworski, supra*, 17 F.3d at 1109 (emphasis added).**

properly characterized them. With the issuance of its opinion in *Kline*, the Sixth Circuit has made it clear that the panel in this case did not even properly delineate the controlling evidentiary standards in its own circuit.

It is, therefore, appropriate to request that this Court exercise its supervisory power to redress the manifest errors of the Sixth Circuit in this case, errors of such an egregious nature as to constitute a "depart[ure] from the accepted and usual course of judicial proceedings". In the wake of *Kline*, however, it is not necessary to grant full plenary consideration to address what appeared to be significant discrepancies as to these issues between the Sixth Circuit and this Court and the other Circuit Courts of Appeals. This Court can exercise its supervisory power pursuant to Sup. Ct. R. 16.1 by entering a summary disposition on the merits in which it VACATES the opinion of the Sixth Circuit in this case and REMANDS this case to the Sixth Circuit for consideration of Respondents' appeal in light of *Kline* and for plenary consideration of MR. HUTCHINSON's cross-appeal to that Court.

Respectfully submitted,

By: /s/ JAMES G. GROSS
Counsel of Record
STEVEN G. SILVERMAN
GROSS, NEMETH & SILVERMAN, P.L.C.
535 Griswold, Suite 1850
Detroit, Michigan 48226
(313) 963-8200
Co-Counsel for Petitioner

By: ALLEN J. COUNARD
CHARLES A. BUTLER
ALLEN J. COUNARD, P.C.
2320 West Jefferson
Trenton, Michigan 48183
(313) 692-0033
Counsel for Petitioner

Dated:
November 10, 1997

APPENDICES TO PETITION FOR CERTIORARI

• • •

APPENDIX A

ORDER

(United States Court of Appeals — Sixth Circuit)

(Filed August 12, 1997)

(KENNETH HUTCHINSON, Plaintiff-Appellee Cross-Appellant, v. FISERV CIR, INC., a successor to Citicorp Information Resources, Inc.; BRIAN MURPHY-MOLLOY, Jointly and Severally, Defendants-Appellants Cross-Appellees — Case No: 95-1821; 95-1897)

BEFORE: MERRITT, COLE and GODBOLD*, Circuit Judges

Upon consideration of the petition for rehearing filed by the Appellee/Cross-Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

Leonard Green,
Clerk

*** The Honorable John C. Godbold, United States Circuit Judge for the Eleventh Circuit, sitting by designation.**

APPENDIX B

ORDER
-NOT RECOMMENDED FOR PUBLICATION-

(United States Court of Appeals — Sixth Circuit)

(Filed July 8, 1997)

(KENNETH HUTCHINSON, Plaintiff-Appellee and Cross-Appellant, v. FISERV CIR, INC., and BRIAN MURPHY-MOLLOY, Defendants-Appellants and Cross-Appellees — NOS. 95-1821/95-1897; On Appeal from the United States District Court for the Eastern District of Michigan)

BEFORE: MERRITT, COLE and GODBOLD*, Circuit Judges

PER CURIAM.

The defendants appeal the district court's denial of their motion for judgment as a matter of law on the plaintiff's age discrimination claim. In his cross-appeal, the plaintiff appeals the district court's (1) dismissal of his claim for the diminution in value of his retirement benefits; and (2) refusal to instruct the jury as to future wage loss. For the following reasons, we **REVERSE** the district court's denial of the defendants' motion for judgment as a matter of law and **REMAND** the case to the district court with instructions to enter judgment in favor of the defendant as to all issues.

I.

Plaintiff Kenneth Hutchinson (Hutchinson) was employed by Citicorp Information Resources, Inc. (Citicorp) and its predecessors from 1962 until his severance in 1989. During that period, Citicorp and its predecessors provided data processing services to credit unions. In 1986, Hutchinson, one of three committee members managing Citicorp's Troy, Michigan branch, suggested that the company change its manage-

ment structure from a committee-based approach to a single branch manager.

As Hutchinson had suggested, Citicorp eliminated the committee-based approach it had used at the Troy facility and decided to vest managerial control over that branch's operations in a single "data center manager." In June 1986, Defendant Brian Murphy-Molloy (Murphy-Molloy) was selected as the data center manager of the Troy facility. At that time, Murphy-Molloy was in his mid-thirties and Hutchinson was fifty-six years old. After Murphy-Molloy became the data center manager, Hutchinson was given the title of "conversion and training manager."

Problems soon arose between Hutchinson and Murphy-Molloy. According to Hutchinson, Murphy-Molloy sent negative reports to headquarters regarding Hutchinson's performance, accused Hutchinson of taking kickbacks from company purchasers, and gradually removed Hutchinson's supervisory responsibilities. In March 1987, Hutchinson was reassigned to the position of senior account executive and required to report to the new conversion and training manager, Molly Maginity (Maginity), a woman in her twenties. Murphy-Molloy testified that he gave the position to Maginity because she had better management skills than Hutchinson. Murphy-Molloy also testified that he assigned Hutchinson to be a senior account executive so that he could concentrate on convincing key clients to use Citicorp's new operating system. Shortly thereafter, Maginity's authority over the senior account executives was removed and given to two different men, Charles Smith and Wesley Vasey. Smith had been one of three people, along with Hutchinson, who had managed the Troy facility prior to Murphy-Molloy's appointment as data center manager. Similarly, Vasey had once been the branch manager of Citicorp's Seattle, Washington data center until it was closed due to economic difficulties. Despite these changes, Hutchinson's salary was not affected.

From 1986 to 1989, Citicorp experienced severe economic problems at several of its branches, forcing it to close offices in South Carolina, California and Washington, and to lay off more than 100 employees. Although the Michigan branch was not closed, the company eliminated approximately thirteen positions at that branch between 1988 and 1989, discharging all but one of its five senior account executives. Citicorp eliminated the jobs of Elbert Montgomery, Mark Pastula, James Jeffries and Hutchinson, but chose to retain one senior account executive, John Urban, citing Urban's superior performance ratings.

After eliminating his position, Citicorp offered Hutchinson his choice of (1) accepting an alternative position with the company, or (2) taking early retirement with a severance package. Of the discharged senior account executives, Hutchinson was the only one offered an alternative position with the company. However, both the positions offered to Hutchinson required him to take a cut in pay and complete a ninety-day probationary period. If Hutchinson failed to complete successfully the ninety-day period, he would be terminated without any of the benefits provided in the severance package. Not wishing to risk the benefits offered in his severance package, Hutchinson declined the alternative positions, accepted early retirement, and ceased working for Citicorp in August 1989. However, Hutchinson's retirement was not effective until March 1, 1990.

On October 1, 1989, Robert Miotke replaced Murphy-Molloy as the manager of the Troy facility. By late February 1990, Citicorp's economic outlook improved and it hired Dick Barage, 46, as a new senior account executive.

On April 18, 1991, Hutchinson filed the present suit in the Oakland County, Michigan Circuit Court, alleging that his termination violated the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101 *et seq.* Specifically, Hutchinson alleged that he had been the victim of age discrimination, causing him to suffer the loss of his

job, diminution in the value of his retirement benefits, and loss of future wages. Thereafter, Defendants Murphy-Molloy and Citicorp[1] removed this action on the basis of diversity of citizenship to the United States District Court for the Eastern District of Michigan. Upon the defendants' motion, the district court dismissed Hutchinson's claim for the diminution in the value of his retirement benefits, holding that such a claim was preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*

The parties tried the case before a jury from April 11 to April 19, 1995. The defendants moved the district court for a directed verdict at the close of Hutchinson's case and again at the close of their own case, but the district court denied the motions. The district court also denied Hutchinson's request to charge the jury as to future wage loss. Subsequently, the jury found in favor of Hutchinson and awarded him $800,000 — $257,000 in lost wages and $543,000 in non-economic damages. The defendants filed post-trial motions to obtain a new trial, to amend the judgment, and to obtain judgment as a matter of law. The district court denied all the defendants' motions and entered judgment on the basis of the jury award.

The parties have timely appealed the judgment of the district court.

II.

In reviewing the district court's denial of the defendants' motion for a judgment as a matter of law, we must determine whether the evidence, when viewed in a light most favorable to Hutchinson, would permit a reasonable jury to find that his discharge was moti-

---

[1] In 1991, Citicorp was acquired by another company, Fiserv, and is currently operating under the name of "Fiserv-CIR, Inc." Because Fiserv-CIR, Inc. is the successor in liability to Citicorp, we refer to this defendant as, simply, "Citicorp."

vated by age discrimination. *See Wilson* v. *Firestone Tire & Rubber Co.*, 932 F.2d 510, 513 (6th Cir. 1991); *Matras* v. *Amoco Oil Co.*, 385 N.W.2d 586, 588-89 (Mich. 1986).

In diversity cases, federal courts apply state substantive law. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938). We therefore look to Michigan law, which provides that Michigan courts consider federal law when reviewing claims of age discrimination based on state law. *Plieth* v. *St. Raymond Church*, 534 N.W.2d 164, 167 (Mich. Ct. app. 1995) (citation omitted). Accordingly, we evaluate Hutchinson's age discrimination claim under both Michigan law and federal law.

III.

The defendants first contend that Hutchinson failed to establish a prima facie case of age discrimination and, thus, argue that the district court erred in denying their motion for a judgment as a matter of law. However, "it is now firmly established in this circuit that when a case has been tried on the merits, a reviewing appellate court need not address the sufficiency of plaintiff's prima facie case, and may instead proceed directly to the ultimate question whether plaintiff has established discrimination." *Brownlow* v. *Edgecomb Metals Co.*, 867 F.2d 960, 963 (6th Cir. 1989). Because this case has already proceeded to trial on the merits and resulted in a jury verdict for Hutchinson, we now consider whether Hutchinson "met his ultimate burden of persuasion regarding his age discrimination claim." *Simpson* v. *Midland-Ross Corp.*, 823 F.2d 937, 942 (6th Cir. 1987) (citing *Ridenour* v. *Lawson Co.*, 791 F.2d 52, 57-58 (6th Cir. 1986); *Wilkins* v. *Eaton Corp.*, 790 F.2d 515, 523 (6th Cir, 1986); *see Plieth* v. *St. Raymond Church*, 534 N.W.2d at 167.

IV.

The defendants next contend that the district court erred in denying their motion for judgment as a matter

of law because Hutchinson failed to prove that age was a determining factor in their decision to eliminate Hutchinson's job. We agree.

If a plaintiff successfully establishes a prima facie case of age discrimination,[2] the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's discharge." *LaPointe* v. *United Autoworkers Local 600*, 8 F.3d 376, 379 (6th Cir. 1993); *see Barnell* v. *Taubman Co., Inc.*, 512 N.W.2d 13, 19 (Mich. Ct. App. 1993); *see also Plieth*, 534 N.W.2d at 167. "Once the employer articulates a legitimate, non-discriminatory business reason for its action, any presumption of discrimination drops from the case, and the burden of persuasion rests squarely on the plaintiff" to show by a preponderance of the evidence that "age was a determining factor in the adverse action that the employer took against him." *Wilson*, 932 F.2d at 514; *see Barnell*, 512 N.W.2d at 19. Under Michigan law, "age is a determining factor when the unlawful adverse action would not have occurred without age discrimination." *Matras*, 385 N.W.2d at 589.

Hutchinson has failed to produce any evidence that age was a determining factor in the elimination of his job. *See Wilson*, 932 F.2d at 514; *Matras*, 385 N.W.2d at 589; *Plieth*, 534 N.W.2d at 167. Hutchinson admits that there is no direct evidence that he was discriminated against on the basis of his age, but argues that a "plethora of circumstantial evidence" exists that shows "a continuing course of discriminatory conduct." Specifically, Hutchinson argues that his various transfers and subsequent replacement by younger employees indicate that the defendants discriminated against him on the

---

2 In order to establish a prima facie case of age discrimination under Michigan law, a plaintiff must show that (1) he was a member of the protected class; (2) he suffered an adverse employment action; (3) he was qualified for his particular position; and (4) he was replaced by someone younger. *See Matras*, 385 N.W.2d at 589; *see also* Mich. Comp. Laws § 37.2202(1)(a).

basis of age. However, an individual's replacement by a younger employee, standing alone, is insufficient to raise an inference of age discrimination under Michigan law. *See Barnell*, 512 N.W.2d at 19.

Hutchinson also argues that Citicorp's elimination of his job and retention of John Urban constituted evidence of the defendants' discriminatory intent. Specifically, Hutchinson argues that Citicorp violated its seniority policy by discharging him — an employee with nearly thirty years' experience — while retaining Urban, a younger employee with less seniority. Even if Hutchinson is correct that employees with seniority should be accorded certain preferences under Citicorp's policy manual, the manual does not state that the company is required to retain less competent employees merely because of their seniority. The defendants note that Urban was rated higher than any other senior account executive on the 1989 performance appraisal; he was the only senior account executive to receive a rating of "outstanding." In fact, Hutchinson himself had once rated Urban an "outstanding" employee and stated that he had no reason to doubt that Urban had continued to perform at that level. More importantly, Hutchinson testified that he did not believe that Vasey, the person who completed his and Urban's evaluations in 1989 and who recommended that Hutchinson's job be eliminated, had ever discriminated against him on the basis of his age. Because Urban was judged the more competent of the two employees and Hutchinson does not challenge the impartiality of that judgment, Hutchinson has failed to demonstrate how Urban's retention constituted age discrimination.

Finally, Hutchinson contends that Citicorp's articulated reason for discontinuing his position — economic necessity — is belied by the company's hiring of a new senior account executive, Dick Barage, approximately ten months later. Noting that Barage was only forty-six years old when he was hired, Hutchinson suggests that the elimination of his job was motivated by age discrim-

ination rather than Citicorp's economic problems. However, Citicorp notes that its financial situation greatly improved between June 1989, when it discharged four of the five senior account executives, and February 1990, when it decided to hire Barage. Also, Citicorp notes that Hutchinson neither expressed any discrimination with his retirement nor any interest in returning to work at Citicorp; he never sought the position that Barage was hired to fill. Accordingly, the mere fact that Hutchinson was ultimately succeeded by a younger individual is not sufficient to raise an inference of age discrimination in this case. *See Barnell*, 512 N.W.2d at 121-22; *see also Lilley v. BTM Corp.*, 958 F.2d 746, 752 (6th Cir. 1992) (holding that the hiring of a younger employee, nine months after the plaintiff was terminated, was not "in any sense relevant to inferring age-based discrimination").

After reviewing all the evidence and inferences therefrom in the light most favorable to Hutchinson, we believe that a reasonable person could not have concluded that age was a determining factor in Citicorp's decision to eliminate Hutchinson's position. *See Wilson*, 932 F.2d at 514; *Matras*, 385 N.W.2d at 589; *Barnell*, 512 N.W.2d at 19. Because Hutchinson failed to raise any inference of age discrimination, we conclude that the district court erred in denying the defendants' motion for judgment as a matter of law.[3]

V.

For the above reasons, we REVERSE the district court's denial of the defendants' motion for judgment as a matter of law and REMAND the case to the district court with instructions to enter judgment in favor of the defendants. In light of this determination, plaintiff's cross-appeal is hereby dismissed as moot.

---

3 Because the issues raised in Hutchinson's cross-appeal regarding his entitlement to damages for the loss of future wages and the diminution in value of his retirement benefits are premised on a finding of age discrimination, we need not address the merits of these issues.

APPENDIX C

ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Session of June 26, 1995)

(KENNETH HUTCHINSON, Plaintiff, v FISERV C.I.R., INC., successor to CITICORP INFORMATION RESOURCES, INC. and BRIAN MURPHY MOLLOY, Jointly and Severally, Defendants — Case No. 91 CV 73164 DT; Hon. Anna Diggs Taylor (P 12773))

At a session of said Court held in the City of Detroit, County of Wayne, State of Michigan, on *June 26, 1995.*

PRESENT: Honorable *Anna Diggs Taylor,*
District Court Judge

This court having read Defendants' Motion For Judgment as a Matter of Law, Or In The Alternative, For New Trial, Motion For Remittitur And/Or Amend The Judgment, and Motion To Stay Execution Of Judgment, and their supporting documents; and having reviewed Plaintiff's responsive pleadings and Defendants' reply; and there having been a hearing on the motion on Monday June 26, 1995, at which all parties were represented by counsel, and the court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that Defendants' Motion for Remittitur And/Or Amend The Judgment is denied.

/s/ *Anna Diggs Taylor*
District Court Judge

Approved as to form only
Robert C. Ludolph
Charles A. Butler

APPENDIX D

ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Session of June 26, 1995)

(KENNETH HUTCHINSON, Plaintiff, v FISERV C.I.R., INC., successor to CITICORP INFORMATION RESOURCES, INC. and BRIAN MURPHY MOLLOY, Jointly and Severally, Defendants — Case No. 91 CV 73164 DT; Hon. Anna Diggs Taylor (P 12773))

At a session of said Court held in the City of Detroit, County of Wayne, State of Michigan, on *June 26, 1995.*

PRESENT: Honorable *Anna Diggs Taylor,*
District Court Judge

This court having read Defendants' Motion For Judgment as a Matter of Law, Or In The Alternative, For New Trial, Motion For Remittitur And/Or Amend The Judgment, and Motion To Stay Execution Of Judgment, and their supporting documents; and having reviewed Plaintiff's responsive pleadings and Defendants' reply; and there having been a hearing on the motion on Monday June 26, 1995, at which all parties were represented by counsel, and the court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that Defendants' Motion For Judgment as a Matter of Law, Or In The Alternative, For New Trial is denied.

/s/ *Anna Diggs Taylor*
District Court Judge

Approved as to form only
Robert C. Ludolph, Charles A. Butler

APPENDIX E

ORDER OF JUDGMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Session of April 26, 1995)

(KENNETH HUTCHINSON, Plaintiff, v FISERV C.I.R., INC., successor to CITICORP INFORMATION RESOURCES, INC. and BRIAN MURPHY MOLLOY, Jointly and Severally, Defendants — Case No. 91 CV 73164 DT; Hon. Anna Diggs Taylor (P 12773))

At a session of said Court held in the City of Detroit, County of Wayne, State of Michigan, on *April 26, 1995.*

PRESENT: Honorable *Anna Diggs Taylor,*
District Court Judge

This matter having been tried by a jury and the jury having returned a verdict in favor of the Plaintiff in the amounts of Two Hundred Fifty Seven Thousand ($257,000) Dollars for loss wages and Five Hundred Forty Three Thousand ($543,000) Dollars for non-economic damages;

IT IS HEREBY ORDERED that judgment is entered in the above captioned matter for Plaintiff against the Defendants, jointly and severally, in the amount of Eight Hundred Thousand ($800,000) Dollars.

IT IS FURTHER ORDERED that interest on the judgment shall accrue and be paid according to 28 USC § 1961.

/s/ *ANNA DIGGS TAYLOR*
District Court Judge

APPENDIX F

PLAINTIFF'S FIRST AMENDED COMPLAINT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed August 21, 1991)

(KENNETH HUTCHINSON, Plaintiff, v FISERV C.I.R., INC., successor to CITICORP INFORMATION RESOURCES, INC. and BRIAN MURPHY MOLLOY, Jointly and Severally, Defendants — Case No. 91 73164)

NOW COMES Plaintiff, by and through his attorneys, ALLEN J. COUNARD, P.C., by Charles A. Butler, and for his Complaint states as follows:

1. That the amount in controversy is in excess of Ten Thousand ($ 10,000.00) Dollars.

2. That at all times pertinent to this Complaint, Defendant Fiserv C.I.R., Inc. (hereinafter Fiserv) is a Delaware Corporation doing business in the County of Oakland, State of Michigan.

3. That at all times pertinent to this Complaint, Defendant Brian Murphy-Molloy resides in the County of Oakland, State of Michigan.

4. That Plaintiff was a Conversion and Training Manager with a company known as Computer Professionals Unlimited when C.P.U. was bought out by Citicorp Information Resources, Inc. (hereinafter C.I.R.).

5. That Plaintiff was then hired into the same position with C.I.R.

6. That Plaintiff was later promoted to the position of Data Center Manager at C.I.R.'s Troy branch.

7. That Plaintiff's birthdate is February 25, 1930.

8. That in June of 1986, C.I.R. demoted Plaintiff to the Conversion and Training Manager position and put Defendant Murphy-Molloy in the Data Center Manager position.

9. That Defendant Murphy-Molloy was then partly responsible for re-writing job qualifications for the people at C.I.R.'s Troy branch to include, inter alia, college degrees.

10. That the purpose for requiring, inter alia, college degrees and other qualifications was to keep the older employees from being promoted or changing position.

11. That in 1987 Defendant Murphy-Molloy demoted Plaintiff to the position of Account Executive Manager.

12. That Plaintiff was again demoted by Defendant Murphy-Molloy to the position of Senior Account Executive.

13. That each time Plaintiff was demoted he was replaced by someone in their 20's or 30's.

14. That in June, 1988 Plaintiff was given an ultimatum to either resign and receive his severance benefits or take a demotion with a forty (40%) percent pay cut.

15. That the new position would have required Plaintiff to be on the road eighty (80%) percent of the time and, if Plaintiff was thereafter terminated, he would lose all severance benefits.

16. That Plaintiff was forced to accept resignation so as not to lose his medical benefits.

17. That Plaintiff was constructively discharged.

18. That C.I.R. owed the following duties to Plaintiff and others similarly situated.

a). To refrain from discriminating against Plaintiff on account of his age;

b). To refrain from discriminating against Plaintiff with regard to the terms and conditions of his employment on account of his age;

c). To refrain from determining Plaintiff's job assignments because of his age;

d). To refrain from demoting Plaintiff on account of his age;

e). To refrain from constructively terminating Plaintiff on account of his age.

19. That C.I.R. breached each of the above-mentioned duties by:

a). Failing to refrain from discriminating against Plaintiff on account of his age;

b). Failing to refrain from discriminating against Plaintiff with regard to the terms and conditions of his employment on account of his age;

c). Failing to refrain from determining Plaintiff's job assignments because of his age;

d). Failing to refrain from demoting Plaintiff on account of his age;

e). Failing to refrain from constructively terminating Plaintiff on account of his age.

20. That Defendant Fiserv is the successor company of C.I.R. and has assumed any potential liabilities for the claims alleged in the instant matter as they pertain to C.I.R.

21. That Defendant Murphy-Molloy owed the following duties to Plaintiff and other similarly situated:

a). To refrain from discriminating against Plaintiff on account of his age;

b). To refrain from discriminating against Plaintiff with regard to the terms and conditions of his employment on account of his age;

c). To refrain from determining Plaintiff's job assignments on account of his age;

d). To refrain from demoting Plaintiff on account of his age;

e). To refrain from constructively discharging Plaintiff on account of his age.

22. That Defendant Murphy-Molloy breached each of the above-mentioned duties by:

a). Failing to refrain from discriminating against Plaintiff on account of his age;

b). Failing to refrain from discriminating against Plaintiff with regard to the terms and conditions of his employment on account of his age;

c). Failing to refrain from determining Plaintiff's job assignments on account of his age;

d). Failing to refrain from demoting Plaintiff on account of his age;

e). Failing to refrain from constructively discharging Plaintiff on account of his age.

23. That Defendants' above-mentioned breaches of duty are each a violation of the Elliott-Larsen Civil Rights Act, M.C.L. § 37.2101 et. seq.

24. That the discriminatory acts and/or omissions as set forth herein of C.I.R.'s employees, agents and/or representatives were done within the scope of their employment and were condoned, authorized and/or ratified by C.I.R.

25. That C.I.R. is liable for the discriminatory acts and/or omissions of its employees, agents and/or representatives as set forth herein pursuant to the Doctrine of Respondeat Superior.

26. That the discriminatory acts and/or omissions as described herein were part of a continuing course of discriminatory conduct against Plaintiff.

27. That upon being hired in 1986 by C.I.R., Defendant Murphy Molloy engaged in a continuing course of conduct which discriminated against Plaintiff on account of his age.

28. That the discriminatory acts and/or omissions set forth herein were done in the furtherance of a policy of discrimination in force with C.I.R.

29. That Plaintiff's employment relationship with C.I.R. required that C.I.R., its employees, agents and/or representatives have good cause for terminating Plaintiff.

30. That Plaintiff's constructive discharge was without good cause.

31. That Plaintiff's constructive discharge was a breach of the employment contract between he and C.I.R.

32. That as a direct and proximate result of Defendants' joint and several discriminatory acts and/or omissions, Plaintiff has suffered, and will continue to suffer in the future, loss of wages and benefits, loss of earning capacity, loss of enjoyment of social pleasures, fear, shock, embarrassment, humiliation, mortification, severe emotional distress, and mental anguish and other injury and damages and any and all other injuries and damages allowable by law.

WHEREFORE Plaintiff prays this Court enter a judgment against Defendants, jointly and severally, in whatever amount in excess of Ten Thousand ($ 10,000.00) Dollars Plaintiff is found to be entitled to including costs, interest, and attorney fees.

ALLEN J. COUNARD, P.C.
By: Charles A. Butler P-40383
Attorneys for Plaintiff
2320 West Jefferson
Trenton, MI 48183
(313) 692-0033

Dated: _____